

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Wilson Chelimo Kanda

CASE NUMBER: 2000846

DIBP REFERENCE(S): BCC2019/4071325

MEMBER: Tim Connellan

DATE AND TIME OF ORAL DECISION AND REASONS: 3 August 2021 at 2:17 pm (VIC time)

DATE OF WRITTEN RECORD: 10 August 2021

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision under review.

Statement made on 10 August 2021 at 6:11pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visas – Subclass 500 (Student) – bogus document with the visa application – bank statement – compelling circumstances – decision under review affirmed

LEGISLATION

Migration Act 1958, s 65
Migration Regulations 1994, Schedule 2 cl 500.217; Schedule 4, PIC 4020

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 30 December 2019 to refuse to grant the visa applicant a Student (Temporary) (Class TU) Subclass 500 visa under the *Migration Act 1958* (the Act).
2. At the hearing on 3 August 2021 the Tribunal made an oral decision and gave an oral statement of decision and reasons. The following is the written record of those reasons.

STATEMENT OF DECISION AND REASONS

3. Mr Wilson Chelimo Kanda, you lodged this application for a student visa on 16 August 2019. To be eligible for the grant of a student visa an applicant must satisfy a range of criteria set out in the regulations.
4. Your application was refused on 30 December 2019 because the delegate found you did not meet a criterion in 500.217 which deals with what are known as Public Interest Criteria. One of those is Public Interest Criteria 4020 which we abbreviate to PIC 4020. It states that there is no evidence before the Minister that the applicant has given or caused to be given a bogus document or information that is false or misleading in a material particular in relation to a visa application.
5. In your case, reading from the primary decision, a copy of which you provided with your review application, it states that on 16 August 2019 you provided evidence to the department that was considered to be of a non-genuine nature being a bank statement from the Cooperative Bank of Kenya for account number 01116312916800 dated 1 October 2019 issued to Abraham Kengogo Kanda.
6. On 1 November 2019 and on 6 November 2019 a department officer contacted the Cooperative Bank of Kenya to verify the financial claims made in support of your student visa application to Australia. During the verification process it was found the bank statement provided does not correspond to the customer's account details and was considered to be a bogus document.
7. On 14 November 2019 you were provided an opportunity to comment on this adverse information. In response you provided a range of documents including: evidence of financial support from your sister Francesca, evidence of her property ownership, her ID card and it says bank documents from Nigeria and Australia. I believe that is a typographical error and should have been Kenya rather than Nigeria.
8. Other documents provided included sponsorship consent from your sister, a compliance certificate and a statutory declaration of yours that states, and we read it during the hearing, that your sister will be your sponsor.
9. Without going back and finding that document again, that Statutory Declaration of yours says that you want to nominate your sister as your sponsor. You stated that you had previously nominated your brother but he ended up not responding to your calls so you had to settle for your elder sister, so that was the extent of the Statutory Declaration.
10. The delegate was not satisfied with your response. You did not respond to the question as to whether there were any circumstances that might lead to a waiver, and so the delegate found you did not satisfy PIC 4021, and therefore found you did not meet 500.217. You appealed that decision to be reviewed by this Tribunal.

11. You have provided number of submissions including one that came in late this morning. Those submissions include a range of documents which predominantly relate to the fact that your sister is now prepared to sponsor you and evidence of her bank information, of your bank information, evidence of transfer of funds from Kenya to Australia, and a range of academic transcripts that show you have completed an MBA and are currently studying at Torrens University.
12. My concern with all your submissions is that ever since you were sent the 'Natural Justice' letter and invited to respond to the fact that it appears there had been a breach of PIC 4020, in that you have provided a bank statement that is false or misleading in a material particular you have not addressed that breach of PIC 4020, but have said, 'Look, but I have got the money'.
13. So at today's hearing I have spent considerable time going back to the fact that the issue in question is whether or not a bogus document or information that was false or misleading had been provided in the form of the bank statement in the name of your brother and have asked you a number of questions.
14. You have provided a number of answers. Firstly, you said, *'I was not aware that false information was provided. I totally believed in him. There is no way known I could have known that if the funds were genuine or not. If I knew I would not have signed the consent form'*. You say, *'I believe the account was genuine, but the funds were not there, or there were not enough funds there on the day of the notification'*. And that argument has been raised on a number of occasions, and reinforced by Mr Ali, your agent, who keeps saying that the account was genuine but at the time of the investigation it did not contain sufficient funds meaning the decision should have been that there were insufficient funds in the account rather than the finding that a bogus document had been provided. And he insists you are a genuine student.
15. The Tribunal is not satisfied by that response, and the evidence before the Tribunal, which includes the statements in the primary decision, are that a department officer contacted the specific bank, the branch of the bank where the account was held on two separate occasions, and said, 'We've got this account number', and the bank's response has been, 'That account number and that statement does not correspond to the name that you have given and the document is a bogus document'.
16. I do not believe there was confusion or a mistake in the response from the bank. Such checks are common practice, well understood by both embassy staff and overseas bank officers. Had the account existed in your brother's name but held less than adequate funds, it is reasonable to expect that the bank response would have so advised. That is not what happened. What they said was, *'That bank account exists but does not belong to the person whose name you have provided'*. I do not believe that response provides any confusion or ambiguity and therefore I believe that what has been provided is a bogus document.
17. You then go on and talk about the fact that you come from a broken family as your parents separated when you were children. Your father is 87 years' old. There has been an argument about inheritance and your brother thinks you have already received your share. You say you believe that what he has done here is an act of betrayal motivated by his desire to make you look bad and to get back at you. You say you have not spoken to him for two years, although you have made multiple attempts to do so.
18. The Tribunal believes this is a very different story to that in your previous evidence where you said, 'The situation is that I had no idea at all' and 'my brother would not have known what the money was for'. Well, that is not a statement of fact, because your brother made a Statutory Declaration that detailed why you were in Australia and what you were studying.

He specifically stated that the funds provided were for your education and living expenses, so it was apparent that he was well aware of what the funds were for, and what he was doing in providing bank statements. I am concerned that by providing conflicting evidence about these matters create questions regarding your credibility as a reliable witness.

19. One of the last things you said was: 'If I had known my brother would have done this to me, I would not have submitted the evidence'. The Tribunal believes this statement indicates you believe it was a genuine act on behalf of your brother.
20. The Tribunal believes that you were aware that the evidence provided was non-genuine, and therefore believes there was purposeful falsity in your submission of evidence that was false or misleading.
21. As I explained to you, when the Tribunal is considering a matter like this there are two stages that must be covered. Firstly, the Tribunal must consider: (a) whether there was a breach of PIC 4020; and (b) if such a finding is made, it must consider whether or not there are circumstances that would lead to the waiver of the requirement to satisfy PIC 4020.
22. I discussed that with you in detail and asked you whether there were circumstances. You did not provide any evidence of any circumstances, but continued with the, 'I believe the funds were there', and 'The account was genuine', et cetera, et cetera.
23. What is required is that there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, permanent resident, or an eligible New Zealand citizen.
24. There is no evidence before the Tribunal that Australia's trade or business opportunities would be adversely affected were you not granted the visa; no evidence that Australia's relationship with a foreign government would be damaged; no evidence that Australia would miss out on significant benefit that you could contribute to Australia's business, economic, cultural or other development; and there is no evidence before me that you have existing family networks already in Australia; or there are significant health and welfare issues affecting an Australian citizen, permanent resident, or eligible New Zealand citizen.
25. Having reviewed all the information on file, I am satisfied that no such circumstances exist. Accordingly, I am satisfied you do not meet the provisions of PIC 4020(4).
26. Therefore, based on the evidence and information before me I am not satisfied you meet Public Interest Criteria, PIC 4020, for the purposes of subclause 500.217.
27. It is therefore the decision of this Tribunal to affirm the decision under review.

DECISION

28. The Tribunal affirms the decision under review.

Tim Connellan
Member